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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

BILL LOCKYER, Attorney General of the State of California, Petitioner, v. **BRUCE McPHERSON, as the Secretary of State for the State of California; and GEOFF BRANDT, as the Acting State Printer with the Office of the State Publishing,** Respondents **EDWARD J. ("TED") COSTA, SIDNEY S. NOVARESI, ARTHUR LAFFER, JIMMIE JOHNSON,** Real Party in Interest.	Case No. **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE BY ATTORNEY GENERAL BILL LOCKYER** **[Code Civ. Proc., §1085]**

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Petitioner,

v.

BRUCE McPHERSON, as the Secretary of State for the State of California; and GEOFF BRANDT, as the Acting State Printer with the Office of the State Publishing,

Respondents.

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE BY ATTORNEY GENERAL BILL LOCKYER

[Code Civ. Proc., §1085]

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I.

INTRODUCTION

This writ petition brought by Attorney General Bill Lockyer involves what one of the respondents, Secretary of State Bruce McPherson, has called "an apparently unprecedented situation. . . ."[1/] The real parties in interest, who are proponents of an initiative constitutional amendment regarding reapportionment, have admitted in a memorandum provided to the Attorney General by the Secretary of State that their signature-gatherers presented a version of their initiative to the voters that differed from the version submitted to the Attorney General. Consequently, the Attorney General prepared his constitutionally-mandated title and summary for a version of the measure that the voters never received, because real parties submitted one version of their initiative measure to the Attorney General and a different version to the voters for purposes of signature gathering. To make matters worse, the Attorney General forwarded the version he received to the Legislature, the Department of Finance and the Legislative Analyst, as required by law, but that was not the version circulated to the voters for signature gathering. And the Attorney General posted the version submitted to him on his website, causing the public to rely on that version. Submission of one version to the Attorney General, but another version for signature gathering, violated the California Constitution and impaired the integrity of the initiative process.

The Attorney General seeks a writ of mandate against the Secretary of State and Acting State Printer Geoff Brandt ordering the Secretary of State to decertify Proposition 77, to remove the initiative from the November 8, 2005 ballot, and to exclude it from the Voter Information Guide for that election. Removal of the measure is necessary because one of the constitutional and statutory requirements for inclusion on the ballot – prior submission to the Attorney General for preparation of a title and summary – has not been satisfied. The version of the initiative that was circulated to the voters cannot qualify for the ballot because it was not presented to the Attorney General prior to circulation. The version submitted to the Attorney General cannot be placed on the ballot because it was not circulated for signatures.

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1. See Petition For Writ Of Mandate, Exh. B (Letter from Secretary of State McPherson to Attorney General dated July 7, 2005, p.1).

The Attorney General anticipates that the initiative proponents may contend that they substantially complied with the Constitution and the Elections Code, but such an argument fails. Substantial compliance with Elections Code requirements has been considered to "save" initiatives from minor, technical and nonsubstantive defects as to form. The initiative proponents here, by contrast, violated a clear requirement of the California Constitution and statutes by submitting a different substantive version for circulation. The constitutional and statutory requirements that the Attorney General receive a "copy" of a proposed initiative prior to circulation and that he forward the copy to the Legislature, the Department of Finance and the Legislative Analyst is not a minor matter that can be disregarded. Moreover, the Attorney General is responsible for informing the voters of the chief purpose and points of a proposed initiative, so the voters are not misled. Allowing proponents to submit one version to the Attorney General, but another version to the voters, would seriously undermine the initiative process and open the door to dangerous "bait and switch" tactics. The Attorney General's titles and summaries are frequently referenced by courts as evidence of the intent of the voters. A failure to comply with the title and summary requirement cannot be glossed over by speculating that the Attorney General might have written a similar title and summary had he been presented with the same version of the initiative that was apparently presented to the voters. Simply stated, the Attorney General's constitutional role cannot be cut out of the electoral process by changing the version of a proposed initiative, regardless of whether the change was inadvertent or intentional. The Attorney General therefore respectfully requests that this Court grant his petition for a peremptory writ of mandate and that the Court direct that Proposition 77 be decertified and that the initiative be removed from the November 8, 2005 ballot and from the Voter Information Guide.

II.

STATEMENT OF FACTS

A. The Attorney General Issued A Title And Summary On February 3, 2005 On A Redistricting Initiative Sponsored By Real Parties In Interest.

Since April 2004, the Attorney General's Office has received 11 proposed initiatives relating to redistricting, including four submitted by Ted Costa on the letterhead of People's Advocate, Inc. (Declaration Of Tricia Knight, ¶ 5.) One of these initiatives was the proposed

initiative at issue in this action, assigned docket number SA2004RF0037. (*Id.*, ¶ 6.) This proposed initiative was received by the Attorney General's Office on December 7, 2004. On that same day, copies of the Initiative were submitted to the Department of Finance and the Legislative Analyst's Office. (*Id.*, ¶ 7.) The proposed initiative was also placed on the Attorney General's website. (*Id.*, ¶ 8.)

On January 28, 2005, Mr. Costa submitted a technical and nonsubstantive amendment to the Initiative which added Dr. Laffer, Mr. Johnson, and Major General Novaresi as proponents. Accordingly, the Attorney General renumbered the Initiative as "SA2004RF0037, Amdt. #1-NS" to reflect the change. (*Id.*, ¶ 8.) No other changes to the Initiative were requested by proponents.

On February 3, 2005, the Attorney General issued his title and summary for SA2004RF0037, Amdt. #1-NS to the Secretary of State. (*Id.*, ¶ 9.) On that same day, the title and summary was transmitted to the Chief Clerk of the Assembly and the Secretary of the Senate pursuant to Elections Code section 9007. (*Id.*, ¶ 10.)

Issuance of the Attorney General's title and summary on February 3, 2005 allowed proponents to commence signature-gathering, using the title and summary on their petitions. (Elec. Code, § 9008.) To qualify for the ballot, a petition for a constitutional amendment must obtain the signatures of 8 percent of the voters for all candidates for Governor at the last gubernatorial election prior to preparation of the title and summary. (Elec. Code, § 9035.)

B. The Secretary Of State Certified Proposition 77 For The Ballot On June 10, 2005.

On June 10, 2005, the Secretary of State certified that the initiative circulated to the voters, now known as Proposition 77, had received sufficient signatures to qualify for the ballot. (Petition, ¶ 6.) Three days later, Governor Schwarzenegger issued a proclamation calling for a statewide special election on November 8, 2005. (*Ibid.*)

C. The Secretary Of State Revealed To The Attorney General On July 1, 2005 That The Initiative's Proponents Submitted A Different Version Of The Proposed Initiative For Signature-gathering Than Was Submitted To The Attorney General For Title And Summary.

On July 1, 2005, Undersecretary of State William P. Wood sent a letter to Senior Assistant Attorney General Louis Mauro stating that the Secretary of State's Office had been informed "that

the text printed on the petitions that were circulated for this initiative differs from the text that was submitted to your office for the preparation of the Attorney General's title and summary." (Petition, ¶ 17.) Mr. Wood's letter enclosed a memorandum dated June 10, 2005 from Daniel M. Kolkey, whom Mr. Wood identified as counsel for the Initiative's proponents, to unknown recipients.[2/] (*Ibid.*) The Kolkey memorandum included an attached chart that listed differences between the Initiative as submitted to the Attorney General and the text printed on the circulating petitions. (*Id.* & Exh. A (Kolkey memorandum to unknown recipients dated June 10, 2005.)

On July 5, 2005, the Yuba County Registrar's Office provided the Attorney General's Office with a copy of the text for the circulating petition that was filed by the proponents. (Knight Decl., ¶ 11.) A comparison of the text of the circulating petition to the text of the Initiative submitted to the Attorney General confirms that the proponents of SA2004RF0037, Amdt. #1-NS circulated a different text from the text that was supplied to the Attorney General for purposes of formulating a title and summary. (*Ibid.*)

III.

ARGUMENT

A. The Attorney General Has Authority To Pursue A Writ Of Mandate To Protect The Public By Seeking Compliance With Constitutional And Statutory Mandates Concerning The Electoral Process.

Courts have long recognized the power of the Attorney General to protect the public interest. In *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, the California Supreme Court stated,

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2. The memorandum from Mr. Kolkey to the unknown recipients was dated June 10, 2005, the same day that the Secretary of State certified the initiative for the ballot. However, the Attorney General does not know when the Secretary of State received the Kolkey memorandum. Thus, the Attorney General does not know whether the Secretary of State was aware of the problem with the signature gathering when he certified the Initiative.

> [t]he Attorney General . . . is the chief law officer of the state (Cal. Const., art. V, section 13). As such he possesses not only extensive statutory powers but also broad powers derived from the common law relative to the protection of the public interest. . . . "[He] represents the interest of the people in a matter of public concern." Thus, "in the absence of any legislative restriction, [he] has the power to file any civil action or proceeding directly involving the rights and interests of the state, . . . the preservation of order, and the protection of public rights and interest."

(*Id.* at pp. 14-15 (internal citations omitted).) To be sure, "The Attorney General, as the chief law enforcement officer of the state, has the authority and power, in the absence of a statute to the contrary to institute, conduct and maintain all civil actions involving the rights and interests of the state." (*People v. Birch Securities Co.* (1948) 86 Cal.App.2d 703, 707.)

As the chief law officer of the State, the Attorney General is responsible for ensuring the integrity of the initiative process. The Attorney General properly brings this action to ensure that only those initiative measures that comply with the laws of the State are presented to the people at the special election. Because real parties' initiative measure failed to meet express constitutional and statutory requirements for inclusion on the ballot, the Attorney General is entitled to the issuance of a writ of mandate as requested in this action.

B. Code Of Civil Procedure Section 1085 Provides The Proper Vehicle For Issuance Of A Writ Of Mandate In This Case.

Code of Civil Procedure section 1085 provides this Court with the power and authority to issue a writ of mandate as requested in this case. Specifically, "a writ of mandate may be issued by any court to compel the performance of an act which the law specially enjoins, as a duty resulting from an office...." (Code Civ. Proc. § 1085(a).) To establish entitlement to the issuance of a writ of mandate under section 1085, the petitioner must demonstrate two basic requirements: (1) that the respondent has a clear, present, and usually ministerial duty to act; and (2) that the petitioner has a clear, present, and beneficial right to performance of that duty. (*People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491.) "A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1082

[quoting *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916].)

In the context of ballot litigation, mandamus has historically been used to compel the Secretary of State to perform constitutionally and statutorily prescribed duties. For example, in *Gage v. Jordan* (1944) 23 Cal.2d 794, a voter applied to the California Supreme Court for mandamus to compel the Secretary of State and local registrar of voters to omit from the electoral ballot a proposed initiative measure. (*Id.* at pp. 796-797.) Petitioner alleged that the signatures gathered and certified for an election, though insufficient to qualify the measure for that election, became ineffective and void for any subsequent election, such that new signatures must be certified. The Secretary of State apparently disagreed, and intended to place the measure on the ballot for the subsequent election. (*Id.*, at pp. 797-799.)

Finding that the measure lapsed prior to the statutory deadlines, the Supreme Court held, "Under circumstances such as those here presented, mandamus is the proper remedy." (*Id.*, at 800.) Thus, the Supreme Court issued a writ of mandate compelling the Secretary of State to omit from the ballot the proposed initiative measure. (*Ibid.*)

In the present case, the Secretary of State has a clear ministerial duty to place on the ballot only those initiative measures that meet the applicable constitutional and statutory requirements, and reject those that do not. (Cal. Const., art. II, § 8, subds. (b) & (c); Elec. Code, § 9002 et seq.) The Secretary of State has no discretion to ignore the express requirements governing ballot measures. The initiative at issue here fails to meet the constitutional requirements concerning submission to the Attorney General because the text of the initiative provided to the Attorney General for title and summary substantially differed from the text of the initiative that the proponents admittedly circulated for the purpose of gathering the necessary signatures to qualify the measure for the ballot. As set forth more fully below, the text of the initiative that was circulated to voters and purportedly "qualified" for inclusion on the November 8, 2005 Special Election Ballot was never provided by the proponents to the Attorney General as required by Article II, section 10, subdivision (d) of the Constitution. And the text of the measure submitted to the Attorney General was never circulated to the voters for signature-gathering purposes. Mandamus is thus proper to compel the Secretary of State to adhere to his official duty to omit the initiative from the ballot for failure to satisfy the

constitutionally mandated prerequisite. And as the chief law officer of the State, the Attorney General has a beneficial interest in seeing that the Secretary of State performs his official, ministerial duty and omit the initiative measure from the ballot.

C. The Constitution Requires That A Copy Of A Proposed Initiative By Submitted By Real Parties For Circulation Was Never Submitted To The Attorney General.

As the Constitution and the Elections Code make clear, it is a mandatory prerequisite that all proposed initiative measures first be submitted to the Attorney General for preparation of a title and summary prior to being circulated among the voters. (Cal. Const., art. II, § 10, subd. (d); Elec. Code, § 9002; see also *Senate of State of California v. Jones* (1999) 21 Cal.4th 1142,1149, and *Zaremberg v. Superior Court, supra*, 115 Cal.App.4th at p. 116.) Article II, section 10, subdivision (d), of the California Constitution provides: "Prior to circulation of an initiative or referendum petition for signatures, a copy shall be submitted to the Attorney General who shall prepare a title and summary of the measure as provided by law." (Cal. Const., art. II, § 10, subd. (d).) Webster's Ninth New Collegiate Dictionary defines a "copy" as "an imitation, transcript, or reproduction of an original work. . . ." or "one of a series of esp[ecially] mechanical reproductions of an original impression." Thus, the Constitution provides that the Attorney General be provided with the exact text that is being submitted to the electors for signature gathering, prior to the commencement of circulation.

In addition, the Constitution authorizes the Legislature to provide the manner in which proposed initiative measures shall be circulated, presented, certified, and submitted to the voters. (Cal. Const., art. II, § 10, subd. (e).) The Attorney General has the authority and obligation to prepare titles and summaries for proposed initiative measures which set forth the purpose of each measure in a true and impartial manner. (*Lungren v. Superior Court* (1996) 48 Cal.App.4th 435, 438, citing Elec. Code, §§ 9051, 9052.) As the courts have long recognized, the main purpose of the Attorney General's ballot title and summary is to prevent the public from receiving misleading or inaccurate information. (*Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 243; *Zaremberg v. Superior Court* (2004) 115 Cal.App.4th 111, 116; *Lungren v. Superior Court, supra*, 48 Cal.App.4th at p. 440.) Thus, the Attorney General's responsibility to

prepare a title and summary is required by the California Constitution and ensures that the electorate will be informed.

Courts have recognized this informational function of titles and summaries by citing them as proof of voter intent. (See *People ex rel. Lungren v. Superior Court* (1997) 14 Cal.4th 294, 306 [citing Attorney General's title and summary as evidence of voter's intent in passing Safe Drinking Water and Toxic Enforcement Act of 1986]; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1264 [citing title and summary in ascertaining voter intent in enacting insurance rate initiative].) And courts have held that titles and summaries are presumed accurate, and that "[w]ithin certain limits" the Attorney General's opinion as to what points are important enough to include in a title and summary should be accepted by the court. *(Lungren, supra*, 48 Cal.App.4th at p. 440.) This deference, of course, presumes that the Attorney General received accurate information in the first place.

Generally, a proposed initiative measure makes its way to the ballot as follows: First, the proponent must submit a "copy" of their proposed measure to the Attorney General and requests that a title and summary be prepared for a circulating petition. (Cal. Const., art. II, § 10, subd. (d).) The Attorney General submits the proposed initiative to the Department of Finance and the Legislative Analyst for preparation of a fiscal analysis. (Elec. Code, § 9005.) The fiscal analysis is to be "delivered to the Attorney General within 25 working days from the date of receipt of the final version of the proposed initiative from the Attorney General. . . ." (*Ibid.*) The Attorney General's 15-day deadline for issuing the title and summary is set by statute and, as relevant here, runs from the time the joint fiscal analysis is delivered to the Attorney General. (Elec. Code, § 9004.) During this 15-day window period, proponents may submit substantive "amendments . . . to the final version of the measure. . . ." When the Attorney General's title and summary is finalized, it is delivered to the Secretary of State (*ibid.*) and, further, the title and summary along with the text of the proposed measure must be "immediately . . . transmit[ted]" to the Legislature, which may then hold public hearings on the measure. (Elec. Code, § 9007.) Only then may a proponent begin circulating their proposed measure among the voters.

The format for a circulating petition is governed by Elections Code sections 9001, 9008,

and 9009. In particular, the circulating petition must include the Attorney General's title and summary and set forth, in full, the title and text of the proposed measure. (Elec. Code, § 9001, 9008.) After signatures are gathered, the petitions are to be filed with county elections officials who, in turn, inform the Secretary of State whether enough signatures have been obtained for the measure to appear on a statewide ballot. (Elec. Code, § 9030.) The Secretary of State has a ministerial duty to ensure that all constitutional and statutory requirements have been satisfied, and, if they have, he certifies the initiative for placement on the ballot. (Cal. Const., art. II, § 8.)

In this case, real party Ted Costa submitted several proposed initiatives dealing with the subject of reapportionment and, for each of the proposals, requested that the Attorney General prepare a title and summary for a circulating petition.[3/] (Knight Decl. ¶ 5.) The proposed measure that is the subject of this lawsuit, SA2004RF0037, was submitted in December 2004. (Knight Decl., ¶ 6.) Shortly after the proposed measure was received, the Attorney General requested that the Legislative Analyst and the Department of Finance prepare a fiscal analysis of the measure pursuant to Elections Code section 9005. (Knight Decl., ¶ 7.) And as with all proposed measures that are submitted for preparation of a title and summary, the Attorney General advised the proponent of the deadline for submitting any substantive changes to the proposal. (Knight Decl., ¶ 6 and Exhibit 2 thereto.) Here, while the title and summary was being prepared by the Attorney General's office, real party Costa submitted one nonsubstantive, technical change to SA2004RF0037 which simply added co-proponents to the measure. (Knight Decl., ¶ 8, and Exhibit 4 thereto.) The Attorney General then issued the title and summary for SA2004RF0037, Amdt. #1-NS's circulating petitions. However, as real party Costa must concede, the circulating petition that was actually presented to the voters was flawed – while it sets out the title and summary the Attorney General issued for SA2004RF0037, Amdt. #1-NS, the text of the purported proposed measure was never submitted to the Attorney General. (See, Knight Decl., ¶ 12, 13, and Exhibits 4 and 9 thereto.) Thus, the voters were asked to evaluate and support the text of a measure that has not been reviewed, analyzed and

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3. Mr. Costa is very experienced at preparing reapportionment measures. (See *Senate of State of California v. Jones* (1999) 21 Cal.4th 1142,1149 & fn. 2, where the Supreme Court describes nine reapportionment proposals submitted by Mr. Costa for title and summary preparation in April and May 1999.)

summarized by the Attorney General. The title and summary circulated by real party Costa was not accompanied by the initiative text upon which it was based.

In no sense could the differences between the submitted initiative text and circulated initiative text be considered to represent technical, nonsubstantive amendments to the submitted text, submission of which would not have been required for Attorney General review. (See Elec. Code, § 9004.) Proponents simply could not gather valid signatures for the initiative text they circulated without either first submitting it to the Attorney General as an independent proposed initiative, or as a substantively amended version of the proposed initiative previously submitted.

D. The Secretary Of State Has A Ministerial Duty To Omit This Initiative Measure From The Special Election Ballot.

A ministerial duty leaves no room for the exercise of discretion on the part of the official performing the act. (*Rixford v. Jordan* (1931) 214 Cal. 547, 555.) The duty is clearly prescribed by law. In the context of initiative measures, the Secretary of State's duties are clearly set forth by the constitution and statutory mandates. If the proponent of an initiative measure fails to follow these constitutional and statutory requirements, the Secretary of State has a ministerial duty not to include the measure on the ballot.

In the instant case, it is undisputed that the initiative text submitted by real parties to the Attorney General for preparation of a title and summary was not the text circulated to the voters for signature, in violation of Article II, section 10(d) of the California Constitution. And the proposed initiative text that real parties circulated to the voters was never submitted to the Attorney General. Thus, neither the text submitted to the Attorney General nor the text circulated to the voters for signature meets the constitutional and statutory mandates for inclusion on the special election ballot.

Under these circumstances, the Secretary of State's ministerial duty is clear: neither initiative can be included on the special election ballot. Therefore, a writ of mandate should issue directing the Secretary of State to omit real party's initiative measure, in either form, from the ballot.

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E. The "Substantial Compliance" Doctrine Does Not Apply Here, And Does Not Remedy The Constitutional Violations.

Because the defects in the process followed by proponents here are defects of substance and constitutional procedure – not defects merely as to form – the "substantial compliance" doctrine does not apply.

> Technical defects of form may be excused if the petitions substantially comply with the requirement, but actual compliance is required in respect to the substance essential to the objective of the statute. Where the purpose of the statutory requirement is to give information to the public to assist the voters in deciding whether to sign or oppose the petition, the substantial compliance argument is often rejected and strict compliance held essential.

(*Ibarra v. City of Carson* (1989) 214 Cal.App.3d 90, 99 [citations omitted]; see also *Ruiz v. Sylva* (2002) 102 Cal.App.4th 199, 211-216 [surveying narrow application of substantial compliance doctrine in election context in course of determining petitions with incorrect typeface substantially complied with requirements].) The decision in *Ibarra* confirms the application of the strict compliance rule, which governs here.

In *Ibarra*, the proponents of a municipal initiative were required to publish a notice of intention to circulate the initiative petition, including the text of the proposed initiative, and the title and summary of the proposed measure and to post them in three public places. (*Id.* at 93-94.) The required materials at issue, however, were not posted by the proponents until three days after they began circulating the petition for signatures. (*Id.* at 95.)

In concluding that the signatures improperly gathered in advance of posting of the information materials could not be counted toward the required signature total, the Court of Appeal rejected the proponents' claim of "substantial compliance." Although the proponents argued that they had properly published in the newspaper, the court reaffirmed the statutory requirements. (*Id.* at 99.) The Court explained:

> [T]he requirement to give notice of intent prior to commencing the circulation serves important purposes educating the public about the petition campaign before it begins. The Legislature has determined that [the public posting process] is an important and valuable means of giving notice to those voters who might not be reached by newspaper publication.

(*Id.*) As a result, by circulating the petition before posting the required information materials, "the

proponents failed to fulfill the essential purpose of the posting requirement and so cannot be excused on the ground of substantial compliance." (*Id.* at 99-100.)

Likewise, here this Court should decline the proponents' anticipated invitation to second-guess or ignore the constitutional and statutory requirements. As described above, the constitutional and statutory requirements for proponents to submit a copy of their proposed ballot measure to the Attorney General and, in turn, to the Legislature serve the essential purpose of informing the voters. The proponents' actions here have resulted in two different texts being published in two different places for one ballot measure. Just as was the case in *Ibarra*, here California law has established the elements of the public information process sufficient to protect the electorate from being misled and to enable voters to intelligently exercise their right to vote. It is not for the proponents here or even this Court to determine which established voter information requirements may be disregarded by ballot measure proponents, inadvertently or otherwise.

To the same effect is the decision in *Hebard v. Bybee* (1998) 65 Cal.App.4th 1331. In *Hebard*, the referendum petitions circulated for signature were required to include the number or title of the ordinance in question. (*Hebard*, 65 Cal.App.4th at 1338.) The title of the ordinance in question was:

> BEING AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CAMPBELL AMENDING THE LAND USE ELEMENT OF THE GENERAL PLAN CHANGING THE LAND USE DESIGNATION OF 19.58 ACRES FROM COMMERCIAL DESTINATION TO INDUSTRIAL TO ALLOW A RESEARCH AND DEVELOPMENT BUSINESS PARK AND CHANGING THE LAND USE DESIGNATION OF FOUR ACRES FROM COMMERCIAL DESTINATION TO PUBLIC/SEMI PUBLIC FOR USE AS PUBLIC OPEN SPACE ON THE FORMER WINCHESTER DRIVE-IN SITE. FILE NO. GP96-02.

(*Id.* at 1335-1336.) On many of the referendum petitions circulated, however, the stated title omitted the three words "of four acres." (*Id.* at 1336.) There was no dispute that the ordinance was correctly identified by number in all petitions and that all petitions included the full text of the ordinance in question (including the exhibit depicting the portions of the property for which the general plan designations were being changed). (*Id.*) Notwithstanding the availability of any necessary clarification of the three-word omission via the number identification of the ordinance in question

and the full text of the ordinance, the Court of Appeal rejected the proponents' assertion of substantial compliance with the title requirement. (*Id.* at 1339-1344.)

In particular, in *Hebard* the Court rejected the proponents' argument that a reader could have examined the text of the ordinance to resolve any question arising from the title. (*Id.* at 1342.) "Voters examining the petition materials simply should not be required to resolve material ambiguities created by an inaccuracy on the petition." (*Id.* at 1342.) Likewise, while it is possible here that a reader of the ballot measure text submitted to the Attorney General and Legislature could conceivably examine the contradictory text attached to the petitions circulated and recognize an issue to be resolved, such acts cannot be required of the petition's readers.

The decision in *Hebard* also confirms that the proponents here cannot simply fall back upon a claim that, in any event, the ballot measure's purpose to change existing redistricting methodology is clear. The proponents in *Hebard* argued that "[t]here could be no confusion in the minds of persons asked to sign the petition as to its purpose, namely, to rescind the industrial designation of the Drive-In property." (*Id.)* The Court held, nonetheless, "Despite the clarity of this statement regarding the petition's goal, it does not correct the inaccurate title above it on the petition." (*Id.)* Just as the omitted information in *Hebard* could have been "relevant to a voter's decision" whether to sign the referendum petition (see *id.* at 1343), here review of the contradictory text submitted to the Attorney General and Legislature could have been relevant to a voter's decision whether to sign proponents' redistricting petition.

As the Court of Appeal noted in *Ruiz v. Sylva* in its survey of substantial compliance decisions in the proposed ballot measure circulation context, "No court has applied the doctrine of substantial compliance to save a petition that provides confusing or misleading information." (*Ruiz, supra*, 102 Cal.App. 4th at 213.) Proponents' anticipated argument that "substantial compliance" is sufficient has no application here.[4/]

Proponents' anticipated analysis of the "substantial compliance" question based upon cases involving post-election disputes is correspondingly flawed. Of course, after an election has taken

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4. Correspondingly, a claim of substantial compliance "may not be relied upon to save carelessly or negligently prepared petitions." (*Ruiz, supra*, 102 Cal.App. 4th at 215 [quoting *California Teachers Assn. v. Collins* (1934) 1 Cal.2d 202, 205].)

place and a ballot measure has been adopted by voters with appropriate and accurate ballot materials before them, questions as to the information available to voters in connection with signature gathering may be of less consequence, and a corresponding claim of substantial compliance in the signature gathering process may be appropriately viewed with a more generous eye toward preserving the measure subsequently adopted by the voters. (See *Chase v. Brooks* (1987) 187 Cal.App.3d 657, 662; *Mervyn's v. Reyes* (1998) 69 Cal.App.4th 93, 103, 105.) But in this pre-election context, there is no call for such a reduced compliance standard. Failure to follow the constitutionally and statutorily mandated process for obtaining a title and summary from the Attorney General is no compliance at all, and impairs of the integrity of the process. The "substantial compliance" analysis is inapplicable to the facts presented in this matter.

If the Court were to apply the "substantial compliance" test to the facts presented, it would be proceeding down a slippery slope of constitutional dimensions. The Attorney General is constitutionally vested with the duty to prepare the title and summary for initiative measures - not the Secretary of State or the judiciary. Although the judiciary may properly review the Attorney General's titles and summaries for accuracy, to apply the "substantial compliance" test in this situation would require the Court to review a title and summary that was never meant to describe the text circulated to the voters. Thus, the Court would be taking this constitutionally mandated duty out of the hands of the Attorney General, and would place itself in the position of having to decide whether the title and summary that was prepared is "close enough" to the text circulated to the voters. Such usurpation of the Attorney General's constitutional role is not appropriate. Therefore, the "substantial compliance" test is not applicable under the facts of this case, and should not be applied by this Court. Proponents' failure to proceed as expressly mandated by the Constitution and statutory provisions should be the determining factor in this instance.

IV.

CONCLUSION

Mere technical, nonsubstantive discrepancies are not presented in this case. As the Secretary of State recognizes, we are faced with an apparently unprecedented situation. Yet the Secretary of State's ministerial duty is clear: Because the initiative measure circulated to the voters

for signatures was never submitted to the Attorney General for preparation of a title and summary as mandated by the Constitution, the Constitution was violated and the measure must not be included on the ballot. And because the initiative measure that was submitted to the Attorney General has not been circulated to the voters for signatures, it also must not be included on the ballot. Were this Court to hold otherwise, it would effectively be removing the Attorney General from his constitutionally mandated role regarding the initiative process, and it would open the door to dangerous "bait and switch" tactics. Such usurpation of the Attorney General's authority is unwarranted. Therefore, the Attorney General respectfully requests that this Court issue a writ of mandate compelling the Secretary of State and the State Printer to omit and remove proponents' initiative measure from the special election ballot and the Voter Information Guide.

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Respectfully submitted,

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